United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 76-4039

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROSE DAVIS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the record as a whole compels an inference that the Company discriminatorily assigned Rose Davis "more arduous and less agreeable job tasks" in violation of Section 8(a)(3) and (1) of the Act.

2. Whether the record as a whole compels an inference that the Company's offer of severance pay to Rose Davis to terminate her employment was violative of Section 8(a)(1) of the Act.

3. Whether the record as a whole compels an inference that the Company harassed Rose Davis because of her union activity and forced her to quit her job in violation of Section 8(a)(3) and (1) of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Rose Davis, an individual, to review and set aside an order of the Board issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 et seq.) dismissing portions of a complaint issued against Caddell-Burns Mfg. Co., Inc. (herein referred to as the Company). The Board's Decision, by Chairman Murphy and Member Penello, with Member Jenkins dissenting, issued on January 20, 1976, and is reported at 222 NLRB No. 74. 1/ This Court has jurisdiction over the proceedings under Section 10(f) of the Act, the events at issue having occurred in Mineola, New York.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the record taken as a whole did not support the allegation that the Company constructively discharged Davis in violation of the Act, and also found that the Company did not violate Section 8(a)(3) and (1) by assigning her more arduous and less agreeable job tasks or Section 8(a)(1) by offering her severance pay if she would quit her job. The evidence underlying the Board's findings is summarized below.

1/ "D & O" references are to the Board's Decision and Order and "JD" references are to the Administrative Law Judge's Decision, reproduced in Petitioner Davis' Appendix. The initial Complaint and Answer are also contained in Davis' Appendix.

"Tr." references are to pages of the trial transcript, reproduced in the Board's Supplemental Appendix. "RX" and "GCX" references are to exhibits of, respectively, Respondent Company and the General Counsel at the trial, and are reproduced in the Board's Supplemental Appendix.

References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

A. Background; Davis seeks out a union, and strongly advocates unionization, but is rebuffed by the other employees

The Company maintains its plant in Mineola, New York, where it is engaged in the manufacture of electrical components and related products (Complaint par. 2(b), Answer par. 1). Its officers are Sidney Burns, President; his son Vincent Burns, treasurer; and his son Thomas Burns, secretary, who is also in charge of production (JD 6; Complaint par. 4, Answer par. 1, Tr. 212, 216, 218-219, 279). Rose Davis was hired as a production worker in October 1973 (JD 2; Tr. 10).

In the spring of 1974, 2/ Davis sought the help of a union for the purpose of organizing the Company's employees. On June 3, representatives of the International Industrial Production Employees Union (herein referred to as "the Union") appeared in front of the Company premises distributing leaflets. That afternoon, after the close of work, Davis and fellow employees Loretta Blandon and Anna Gomez spoke with the union representatives just outside the plant for 10 or 15 minutes and were observed by Thomas Burns (JD 2; Tr. 16-19). The next day Blandon was discharged. Unfair labor practice charges, alleging discriminatory discharge, were later filed on Blandon's behalf before the Board, and a complaint issued. The matter was settled without a Board adjudication in October, as discussed infra (JD 3; Tr. 524-525).

Following Blandon's discharge, Davis protested to the Company that it was she, not Blandon, who had brought in the Union (JD 2; Tr. 24,

2/ All dates herein are in 1974.

28). Davis gave her reasons for thinking the employees should have a union. Vincent Burns commented that he "knew one day someone would come in and organize the place, if it was not /Davis/ it would be somebody else." Thomas Burns commented that Davis should take care of herself and not worry about others (Tr. 28-30).

Following Blandon's discharge, some employees who had previously shown interest in the Union began to withdraw (JD 2; Tr. 24-27). Davis, feeling deserted by her colleagues, upbraided them for their change of mind and continued to push her viewpoint. Davis' manner was assertive, and the relationships between the employees deteriorated (JD 2-3; Tr. 22-27, 164-170, 255-256, 370-372, 381-385, 400-401, 440-446, 451-452, 481-486, 489-490, 503, 511). At one point in a heated discussion about the Union, Davis threatened to slap employee Olive Xiques (JD 3 n. 1; Tr. 372, 400, 447-448). Twice Davis offered to fight Catherine Gianetti, a long-time rank-and-file employee with close ties to the management (JD 3 n. 1; Tr. 34, 374, 403, 446-447). Openly, in the shop, Davis made statements to the effect that Gianetti was sleeping with Company President Burns (JD 3 n. 1; Tr. 33, 463-464). Soon, Davis became isolated. While prior to the union effort she had always had lunch with the other employees, once that effort began she ate alone and apart from the others (JD 2-3, 9; Tr. 96-97, 253, 402). Some employees told Davis they were uneasy about associating with her for fear of losing their jobs (JD 3; Tr. 97). Others turned against her because they did not like her and because she "caused tensions and very lousy working conditions" (Tr. 381-382) through her persistent and often abrasive attempts to win them over to the Union (JD 2-3; Tr. 373, 379-383, 390-391, 448-450, 464-465, 489-490).

B. Davis is reprimanded for tardiness

The starting time for production employees at the Company was 7:55 a.m. (JD 8; Tr. 11, 243). For at least a month prior, and for the entire period subsequent, to the June 3 handbilling, Davis was chronically late for work. From June until after her resignation in November, Davis was tardy more than other employee, except for two who had Company permission to come in late due to special circumstances (JD 8 n. 6; Tr. 162-163, 238-242, 263-266, 287-288, 344-345, 363-364, RX 4, RX 5). Sometime after the initial Union handbilling, Davis was reprimanded for her tardiness and was threatened with discharge if she did not come in on time (JD 8; Tr. 48, 305).

C. Davis is given new, but not unusual job assignments

The production workers at the Company are not divided into departments. Rather, they are a single pool of workers, all of whom may be assigned to any one of a number of different tasks. More specifically, job assignments are based on customer requirements and the availability of workers and skills required. Thus, when a job needs to be done, it is given to the next available employee, with consideration given as to whether the employee is capable of doing it. When an employee receives as assignment he or she has not done before, instructions are given. Once an assignment is given, the employee normally continues with it until the task is completed. In sum, employees are assigned to particular tasks as the need arises, and there are neither set assign-

ments as to the type of work each employee does, nor patterns as to the type of job done by a particular employee at a particular time (JD 5; Tr. 74, 222-228, 236-237, 279-281).

For the first six months of her employment at the Company Davis was generally assigned, through the relatively random procedure described above, to packing and printing jobs (JD 5; Tr. 73). Following the June 3 handbilling, Davis noticed that she began to receive assignments to milling machines and assembly jobs that she had not previously done; there is no indication that these tasks were any less desirable than those she had done before (JD 5; Tr. 73). In July she was assigned, for the first time, to soldering operations at a soldering pot in the rear of the plant which generated very high temperatures, and was directed to perform certain cleaning operations under disagreeable conditions (JD 5; Tr. 34-36, 40-41, 118, 280, 322-323).

A number of employees were assigned to soldering at the rear of the plant from time to time, including during the summer, although apparently Davis worked at it more than other single employee that July and August. While it was deemed an undesirable task, employees did it without complaining to management (JD 6, 9; Tr. 234-236, 282-283, 338-339, 341-343, 365-367, 370, 426-427, 432-433, 434-436, 438-439, 453-454, 474-478). Employees who complained that their health was adversely affected by it were removed from the soldering (JD 6; Tr. 39, 262-263, 439-440). Davis complained about doing soldering, but there is no evidence that she told anyone that her health was jeopardized by it (JD 6; Tr. 37).

For two days in September, Davis was assigned to a cleaning operation which involved the removal of a large number of transformers from a five-gallon can in which they were immersed in a chemical, and cleaning them with a brush (JD 6; Tr. 40-42). She had never been assigned to this task before, but many other employees had been assigned to it and continued to be assigned to it (JD 6, 9; Tr. 118, 247-250, 283-284, 339-341, 427, 480). Most employees used prongs to remove the transformers, but others used their hands (JD 6; Tr. 341, 349-351, 428, 480). Davis, apparently unaware of the prongs, used rubber gloves, but found that the chemical dissolved the gloves and irritated her arm (JD 6; Tr. 43-44). When she told Thomas Burns about the problem, Burns assured her that the chemical was not harmful, but did not specifically tell her about the prongs (JD 6; Tr. 44).

D. In response to a suggestion of the Union, the Company offers Davis severance pay if she would resign

The hearing before an Administrative Law Judge on Blandon's discharge took place in mid-October (JD 3; Tr. 524-525). Davis appeared as a prospective witness (JD 3; Tr. 51-52). Prior to settlement of the case, Union Representative Leo Garber told Davis that he did not think she should continue to work for the Company, that it was not a good place at which to work (D & O 2, JD 4; Tr. 105). Garber also told Company counsel that Davis was unhappy there and might be better off if she left; he suggested that Davis be offered two weeks' severance pay (D & O 2, JD 3-4, 9; Tr. 351-361). Subsequent to Garber's suggestion Company counsel

told Davis that the Company did not want her and offered two weeks' pay and another job elsewhere if she would resign (JD 3, 9; Tr. 53-55). Davis refused the offer (JD 3; Tr. 55). Later, she let it be known that she would return for 60 days to see to it that the Company carried out its obligation to post the Board's official notice pursuant to the settlement (JD 4; Tr. 102, 375-376). Following Davis' rejection of the Company's offer, Davis and the Company's counsel passed by Company President Burns and employee Catherine Gianetti, who were standing together. Gianetti, whom Davis had accused of sleeping with Burns, said that she did not want Davis back at work. Company counsel responded that there was nothing more he could do and that if Davis wished to continue to work, she should be permitted to do so (JD 3-4; Tr. 56).

E. Davis is assigned to a winding operation that is new to her, and her slow production is harshly criticized; Davis quits

After her assignment to the chemical cleaning job for two days in September (supra, p. 7), Davis did not receive any assignments that were new to her until Wednesday, November 6. At that time she was assigned the task of winding wire around a large number of coils (JD 7; Tr. 61). Davis was slow in accomplishing the task. Thomas Burns criticized her slow work, and Davis explained that the slowness was due to her left-handedness and the fact that this was her first time doing winding (JD 7; Tr. 61-62, 288). The next day, Thursday, November 7, Burns gave employee Mary Rowe half of the remaining coils; Rowe was experienced at winding (JD 7; Tr. 61-63, 365). Later in the day, Burns

confronted Davis with the fact that Rowe had done 170 coils, while Davis had completed only 25 (JD 7; Tr. 295-296). Burns asked Davis, "How come you are not finished yet? How come, is the work too hard for you? If you cannot do it, maybe you don't belong working here" (JD 7; Tr. 63). Davis again explained her difficulty and told him that he should let Rowe do it all. Burns did not reply, but continued to stand over Davis. Davis then told Burns to leave her alone and go talk with his "Mommy," meaning Gianetti (JD 7; Tr. 63). Davis told Vincent Burns that she believed that she was being treated unfairly and only planned to stay for 60 days to see that the Blandon settlement letter was properly posted and later told him that she would file a charge with the Board. Davis worked on Friday but did not come to work on Monday. On Tuesday, November 12, Davis called the Company to say that her nerves could no longer take the strain and to say that she was quitting (JD 5; Tr. 64-68). The Company wrote a letter to her the next day, acknowledging her resignation (JD 5; Tr. 68, GCX 3).[3/]

II. THE BOARD'S CONCLUSION AND ORDER

The Board concluded, in agreement with the Administrative Law Judge, "that the record does not warrant the conclusion that /the Company/ constructively discharged Rose Davis" (D & O 2, JD 10) and affirmed the Judge's findings that the Company did not violate the Act by its offer to Davis of "severance pay to terminate her employment," or by giving

3/ On the weekend prior to her resignation Davis received an anonymous obscene telephone call. There is no evidence to link that call with this case (Tr. 66, 507).

her "onerous or oppressive assignments," since the record did not establish that the Company "discriminatorily chose her to do the assigned jobs" (D & O 1, JD 9). As a result, the Board dismissed those allegations of the Complaint. 4/

ARGUMENT

THE BOARD REASONABLY CONCLUDED THAT THE COMPANY DID NOT CONSTRUCTIVELY DISCHARGE, HARASS, OR OTHERWISE DISCRIMINATE AGAINST EMPLOYEE ROSE DAVIS BECAUSE OF HER UNION ACTIVITY AND THEREFORE PROPERLY DISMISSED THE COMPLAINT ALLEGATIONS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT IN THIS MANNER

A. Introduction

The question in this case is whether the pro se petitioner, Rose Davis, was discriminated against because of her union activity. As the Board noted (D & O 2, JD 9), the circumstances surrounding the Company's treatment of Davis were "suspicious." Another active supporter of the Union was promptly fired by the Company in circumstances which gave rise to an unfair labor practice complaint that was thereafter settled.

4/ The Board found a violation of Section 8(a)(1), however, in the Company's announcement in June, shortly after the Union activity began, that it "had intended to give the employees a raise, 'but now that the union is here no one can get a raise'" (JD 4, 8; Tr. 57). The Board dismissed the allegation that the subsequent grant in late November of the wage increase constituted an additional violation, noting that, having found that the initial withholding of the increase was illegal, it could not find that the Company "also violated the Act by doing what it should have done in the first place" (JD 4, 8). These conclusions are not contested in this case.

Member Jenkins dissented from the Board's finding that Davis was not constructively discharged for unlawful reasons. In his view, the Company's anti-union animus was demonstrated by its announcement that it was withholding a wage increase, and with respect to Davis, he concluded that the Company's "exercise /of/ its prerogative to an unreasonable excess" established a "prima facie case of constructive discharge" (D & O 5-6).

The Company knew of Davis' union activity, and Davis' claim that she was subjected to harassment following the Company's learning of her union activity has a colorable basis in fact: there is evidence that she was assigned to a disagreeable soldering job for a period longer than others; that the Company permitted her to perform a job requiring the use of irritating chemicals without specifically pointing out that a tool was available which would reduce her exposure to the chemical; that her tardiness, a problem before her union activity, was now a subject of complaint; and that in her last week of employment the Company provoked "a hostile, somewhat childish confrontation" (JD 9) over her slow production. Further, there is direct evidence that the Company did not want Davis to continue in its employment.

The foregoing evidence -- suggesting that Davis was treated differently by the Company after it learned of her union activity--is, of course, the type of evidence on which the Board traditionally relies in inferring unlawful discrimination. However, the fact that the Board might conceivably have inferred that Davis was unlawfully discriminated against is not decisive. Rather, as we show below, the decisive question is whether the Board was required to infer unlawful discrimination because this is the only rational conclusion to be drawn from the record considered as a whole. Since, as we show below, the record contains additional evidence, which casts a different light on Davis' claims, the Board's dismissal of the relevant complaint allegations should be affirmed.

B. General principles: The standard for review

The issue here, as in every Section 8(a)(3) case is "the 'true purpose' or 'real motive'" behind the adverse action taken. Local 357, Teamsters v. N.L.R.B., 365 U.S. 667, 675 (1961), quoting Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 43 (1954). If the Company's treatment of Davis was not motivated by a desire to discriminate against her because of her union activity, it is immaterial whether the actions were arbitrary, unfair, or unreasonable. For, as the courts have often held, the Act does not "give the Board any control whatsoever over an employer's policies ... /A/n employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act." N.L.R.B. v. Ace Comb Co., 342 F. 2d 841, 847 (C.A. 8, 1965). See also, Associated Press v. N.L.R.B., 301 U.S. 103, 132 (1937); N.L.R.B. v. Great Eastern Color Lithographic Corp., 309 F. 2d 352, 356 (C.A. 2, 1962), cert. denied 373 U.S. 950; N.L.R.B. v. McGahey, 233 F. 2d 406, 413 (C.A. 5, 1956). And, as the Board has recognized, "/I/n every case, a violation of the Act must be proved by the General Counsel by a preponderance of the evidence." Falstaff Brewing Corp., 128 NLRB 294, 295 n. 2 (1960), enf'd as modified, 301 F. 2d 216 (C.A. 8, 1962). See also, NLRB, Statements of Procedure, Series 8, Section 101.10(b), 29 C.F.R. 101.10(b).

Of course, where there is no direct evidence of a discriminatory motive, the Board must examine the record to determine if there is support for an inference of such motivation. Such an inference, however, "must be based upon evidence, direct or circumstantial, not upon mere suspicion." Cedar Rapids Block Co. v. N.L.R.B., 332 F. 2d 880, 884 (C.A. 8, 1964).

See also, N.L.R.B. v. Finesilver Mfg. Co., 400 F. 2d 644, 649 (C.A. 5, 1963). Where the Board finds insufficient evidence to support such an inference, "that determination must be upheld unless it has no rational basis." International Ladies' Garment Workers Union, AFL-CIO v. N.L.R.B., 150 U.S. App. D.C. 71, 83, 463 F. 2d 907, 919 (1972) and cases there cited. And it is well settled that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951). We show below that the record evidence, considered as a whole, does not compel an inference that Davis was unlawfully constructively discharged or was otherwise treated unlawfully, and hence the Board's dismissal of that part of the complaint should be affirmed.

C. The Board was not required to conclude that the Company discriminatorily assigned Davis "more arduous and less agreeable job tasks" in violation of Section 8(a)(3) and (1) of the Act

The Board, in agreement with the Administrative Law Judge, concluded that Davis' difficult work assignments were not made discriminatorily, noting "that such assignments were made to all employees on a rotating basis ... /The Company's/ other employees had at one time or another performed these tasks. There is nothing in the record which would show that Davis was unlawfully singled out" (D & O 2). As noted in the Counterstatement, many employees -- at least 10 of the 15 production workers (Tr. 234) -- performed soldering operations in the rear of the shop,

and at least five of those performed this task under the unpleasant conditions which prevailed during the summer months: Catherine Gianetti (Tr. 435-436), Olive Xiques (Tr. 454), Anne Spinella (Tr. 338, 342), Mary Rowe (Tr. 365), and Charlotte Dippel (Tr. 478). Although Davis may have done more soldering in this period than any other single worker, there is no evidence that she was assigned to an inordinate amount of it. Further, while the Company responded sympathetically to employees who complained that they felt faint or that their health would not permit them to perform this job (Tr. 39-40, 233), there is no evidence that Davis ever claimed more than that the job was highly disagreeable -- a perception undoubtedly shared by all the other employees who were required to perform it.

Similarly, other employees also performed the cleaning operation to which Davis was assigned for two days in September. For example, the record is clear that Gianetti, Spinella, and Dippel did that job (Tr. 248-250, 338-340, 427, 480). Furthermore, Davis was not the only employee to use her hands to remove the coils from the chemical, and prongs were "available to anybody" for the purpose of removing the coils (Tr. 341, 351, 428, 480). Thus, the ready availability of the prongs, which appeared to be general knowledge in the shop (Tr. 351), minimizes the import of Thomas Burns' failure specifically to point out the prongs when Davis complained that she believed, contrary to Burns' reassurances, that the chemical was dangerous (Tr. 44-45).

Additionally, the evidence as to timing is not as compelling as it might first appear. The Union's campaign began in the first week

of June, and the Company immediately learned of Davis' support for the Union. Yet Davis was not assigned to any undesirable task until July, and in the interim, the only union activity appears to have been her own assertive and wholly unproductive efforts, which served to alienate her from the other employees (supra,pp. 4 , 6). The time lag between the Company's learning of her union activity and its first assigning her to an unpleasant task, as well as the fact that several other employees (including Gianetti,who was very close to management) also did these same tasks, points to the conclusion that Davis' assignments were not made in retaliation for her efforts in an aborted union campaign, but rather occurred in the normal course of the production operation. Thus, the Board determined that the evidence did not establish that Davis had been treated discriminatorily in her job assignments. This determination certainly has a "rational basis" (I.L.G.W.U. v. N.L.R.B., supra, 463 F. 2d at 919), and therefore should be sustained.

D. The Board was not required to conclude that the Company violated Section 8(a)(1) of the Act by offering Davis severance pay to terminate her employment

In support of his contention before the Administrative Law Judge and the Board that Davis was discriminatorily treated,counsel for the General Counsel asserted that the Company's offer to Davis of severance pay if she would resign was an indication of the Company's discriminatory intent and constituted an independent violation of Section 8(a)(1). Neither the Judge nor the Board found merit in this contention (D & O 2, JD 9).

First of all, the offer was made at the instance of a representative of the Union, who suggested to Company counsel that Davis was unhappy and might prefer to leave if an appropriate offer was made. This fact alone indicates that the Company was not going out of its way to rid itself of Davis. Moreover, as the Board noted, the Company "had legitimate grounds for disliking Davis which would lawfully prompt an offer of severance pay" (D & O 2). As shown in the Counterstatement, Davis had thoroughly alienated herself from her colleagues and had caused, in Spinella's words, "much trouble and ... tensions and very lousy working conditions, very unhappy working conditions" (Tr. 381). The direct threats made to Olive Xiques and Catherine Gianetti exacerbated the matter. Furthermore, Davis' "uncomplimentary remarks about members of management" (D & O 2) were of a nature that would certainly lead the Company to prefer that she depart. Thus, Davis' accusations, made in the presence of Thomas Burns, that employee Gianetti had illicit sexual relations with his father, Sidney Burns, was ample cause for enmity toward Davis which would result in an affirmative management response to the Union representative's suggestion that Davis might wish to leave. Further, in President Burn's presence, Gianetti made no secret of her desire that Davis cease to work at the Company.

E. The Board was not required to conclude either that the Company harassed Davis because of her union activity or that it forced her to quit in violation of Section 8(a)(3) and (1) of the Act

As shown supra, pp. 13-16 the Company did not discriminatorily assign Davis less desirable tasks in July, August, and September, nor did it act illegally when (in response to the Union's suggestion at the October hearing) it offered Davis severance pay if she would resign. The remaining elements in Davis' case that she was unlawfully harassed and constructively discharged because of her union activity have to do (1) with the fact that the Company harshly criticized her performance on a coil winding job in November and (2) the fact that at some unspecified time after her union activity the Company reprimanded her and threatened her with discharge if she did not start coming to work on time. We show below that these facts also did not require the Board to infer that Davis was unlawfully discriminated against.

As shown supra, p. 15, Davis' excessive reaction to the failure of the Union's organizational effort in June -- a reaction which included threats to certain employees and the making of provocative remarks about the alleged illicit relationship between employee Gianetti and President Burns -- had alienated her even from her fellow employees. Further, in light of this reaction, the Board could reasonably conclude, as it did (D & O 2, JD 9-10), that quite apart from Davis' union activity, the Company had good grounds for disliking her and that these grounds accounted for the Company's hostility to her. Particularly in a small

family-run business, such hostility could be expected to find expression, and hence it is hardly surprising that in November, when Davis performed poorly on a coil winding job, Thomas Burns was less than sympathetic. Davis admittedly was slow in performing this job -- a fact which was made embarrassingly plain when Burns assigned a more experienced employee to the job and she produced 170 coils in the time it took Davis to produce 25. However, as the Board indicated although Burns may have been harsh, overbearing, and even "somewhat childish" (JD 9) in his treatment of Davis on this occasion, on this record it is not necessary to conclude that his conduct represented an attempt to punish Davis for her support of the Union.

Finally, the Board also was not required to conclude that the Company's criticism of Davis' tardiness, subsequent to her union activity, was a form of unlawful discrimination. The Board found, and there is no evidence to the contrary, that Davis was repeatedly tardy and that (except for two women who had permission to come in late each day because of family responsibilities) she was late more than any other employee. Further, while it is true that Davis was often late in the month prior to the June 3 union handbilling, and was not reprimanded, her tardiness became more egregious in July and August. In May, July, and August, Davis was late 50 percent of the days she came to work. However, while in May her lateness averaged about 5 1/2 minutes (the latest being a 24 minute period), in July she was late an average of 29 1/2 minutes, once being late more than an hour and another time being late more than two and a half hours. And in August she averaged 24 1/2 minutes late,

once being late more than two hours (RX 5). Thus, the record demonstrates that her tardiness became increasingly flagrant, justifying reprimand and indicating that the reprimands had a factual basis independent of her union activity. Accordingly, as the Board reasonably concluded, Davis was not "immune from criticism of her tardiness -- which was excessive -- merely because she had not been reprimanded in the past" (JD 9).[5/]

In sum, Davis understandably felt disappointment at not being able to win her fellow workers to her viewpoint. Isolated and in conflict with her colleagues and angry at management, she became unhappy at the

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5/ As charging party, Davis sought to reopen the record for the purpose of entering into evidence pay stubs which she asserted would show that there was a five-minute "grace" period after the 7:55 a.m. starting time during which employees were not "docked" pay (Petitioner's Appendix -- Petitioner's Exceptions and Motion for a Reopening of the Record, Point IV). Davis' purpose in seeking to introduce this evidence was, presumably, to suggest that because she was paid for time not worked, the Company was not really concerned about her tardiness. The evidence which Davis sought to submit, however, is both cumulative and unpersuasive, and hence her request was properly denied by the Board (D & O 1 n. 1).

The pay records submitted by the Company (RX 4) show the times that Davis clocked in and show that, with but a few exceptions, when Davis was less than five minutes late, she was credited with a full eight hours. However, the records also reflect that while actual working time was recorded precisely, paid time was kept on a quarter-hour basis, and hence when Davis was only ten minutes late, she was docked for fifteen minues. In these circumstances, even assuming that the Company's payment policy results in a grace period for employees who are only five minutes late, it does not follow that tardiness was of no consequence to the Company or that the grace period could not be abused. In the month of July, for example, Davis was late on some 12 occasions and on eight of them, her lateness fell outside the "grace period." In August she was late on some eight occasions, and on four of them she was more than five minutes late. With such a record, she was obviously vulnerable to legitimate criticism, and the Board properly so found.

Company. But, as the preceding review of the evidence has demonstrated, none of the incidents involving Davis which led her to resign must be found to have been discriminatorily motivated. In light of these facts, the Board reasonably concluded that Davis was not constructively discharged in violation of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Petition for Review should be denied.

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National Labor Relations Board.

July 1976.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROSE DAVIS,	:	
Petitioner,	:	
v.	:	No. 76-4039
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Board's brief, in the above-captioned case, have this day been served upon the petitioner at the address listed below:

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Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 29th day of July, 1976.